



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 22, 1996

Mr. Robert D. Lemon
Perryton City Attorney
Lemon, Shearer, Ehrlich, Phillips & Good
P.O. Box 1066
Perryton, Texas 79070-1066

OR96-0383

Dear Mr. Lemon:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38154.

The City of Perryton (the "city") received an open records request for certain records connected with a confidentiality agreement between the city and Texas-New Mexico Power Company (the "company"). You first contend that because the requested information is subject to a confidentiality agreement the city may not release the information. Please note, however, that information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within one of the act's exceptions to disclosure, it must be released, notwithstanding any contract between the city and the company specifying otherwise.

You also contend that portions of the documents at issue come under the protection of the attorney-client privilege and the work product privilege and thus may be withheld from the public pursuant to sections 552.107(1)¹ and 552.103² of the

¹Although you actually raised the attorney-client privilege in the context of section 552.101 of the Government Code, this privilege is more properly deemed to be an aspect of section 552.107(1), which protects "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of

Government Code. However, rather than raising these two exceptions in your initial letter to this office, you did not evoke these exceptions until long after the tenth day following the city's receipt of the open records request. Section 552.301(a) of the Government Code specifically provides:

A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general's decision *and state the exceptions that apply within a reasonable time but not later than the 10th calendar day after the date of receiving the written request.* [Emphasis added.]

Additionally, section 552.302 of the Government Code provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301(a), the information requested in writing is presumed to be public information." Because you did not raise any argument for withholding the requested information pursuant to these two provisions in a timely manner, these exceptions are presumed to be waived. This presumption can be overcome only by a demonstration that compelling reasons exist for considering the untimely raised exceptions. Open Records Decision No. 515 (1988) at 6. You have made no such demonstration with regard to sections 552.103 or 552.107(1). We therefore deem these two exceptions as being waived.

You also contend, however, that portions of the requested information may come under the protection of section 552.110 of the Government Code. Because section 552.110 protects information that is confidential by law and is intended to protect the proprietary rights of third parties, in this instance we will address the applicability of this section.³ In accordance with the practice of this office established in Open Records Decision No. 575 (1990), this office notified representatives of the company that we

(Footnote continued)

Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." See Open Records Decision No. 574 (1990).

²In the context of open records requests, the work product doctrine merely represents one aspect of the "litigation" exception, section 552.103 of the Government Code. Work product may be withheld only if it "relates" to pending or reasonably anticipated litigation to which the governmental entity is or may be a party. See Open Records Decision Nos. 575 (1990), 574 (1990) (discovery privileges not encompassed by statutory predecessor to § 552.101).

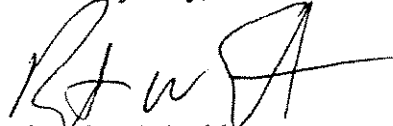
³We note that section 552.110 presents a compelling interest for non-disclosure because the improper release of confidential information constitutes a misdemeanor. See Gov't Code § 552.352.

received your request for an open records decision regarding information pertaining to the company. In our letter to the company, this office requested an explanation as to why portions of the records at issue were excepted from public disclosure, with the caveat that its failure to provide such an explanation within a reasonable time would result in this office instructing the city to disclose the information.

Although the company timely responded to our notice, it did not provide this office with any reasons why the requested information should not be released and in fact stated that the information it submitted to the city that is at issue in this request is not excepted from disclosure. Consequently, we have no basis for applying section 552.110 to this information. See Open Records Decision No. 552 (1990). The city therefore should release the information in its entirety at this time. If you have any questions regarding this letter, please contact our office.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Robert W. Schmidt
Assistant Attorney General
Open Records Division

RWS/RWP/ch

Ref.: ID# 38154

Enclosures: Submitted documents

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